Hewlett Packard Sales (M) Sdn Bhd v Active Team Mould Engineering Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–1966 OF 1999
VINCENT NG J
27 SEPTEMBER 2002

Civil Procedure *— Appeal — Reinstatement — Appeal struck out due to non-attendance — Whether the non-attendance at the hearing of the matter was culpable — Whether the applicant tendered or presented sufficient material in his application, to show that he has a plausible or arguable defence/claim*

This is an application to reinstate an appeal (encl 24) which had been struck out due to non-attendance of the third defendant ('D3') and his counsel. The issue for determination of the court is whether to reinstate encl 24. In an application for reinstatement two questions, in the interests of the due administration of justice, fall to be considered, namely: (i) whether the non-attendance at the hearing of the matter was culpable; and (ii) whether the applicant tendered or presented sufficient material in his application, to show that he has a plausible or arguable defence/claim.

Held, dismissing the application with costs:

(1) The assertion of Mr Hiew, that the Bar Council Box No 502 was in fact his firm's box number for the lower courts, smacked of negligence on the part of his firm's employees. At any rate, as he had acknowledged that an earlier encl 23 (being the notice of appeal against the senior assistant registrar's decision disallowing the use of an affidavit) was duly received by his firm though it bore the same box number stamped as 'Box No 502', the court was not at all persuaded to the view that encl 24 did not reach his firm (see p 250B–C).

(2) On the second question, para 7(b) of encl 29 only contained a general and bare statement that there were in the appeal, without condescending to any particulars pertaining to the question of or to at least state, for example, that the merits were as set out in the defence or an earlier affidavit (if notice of intention to use same had been given). As encl 29 was totally devoid of such particulars, the court held that there was no material presented to the High Court to found any exercise of the court's discretion (see p 250D–E).

[Bahasa Malaysia summary

Ini adalah satu permohonan untuk menghidupkan semula satu rayuan (lampiran 24) yang telah dibatalkan oleh sebab ketidakhadiran defendan ketiga ('D3') dan peguam beliau. Persoalan untuk ditentukan oleh mahkamah adalah sama ada untuk menghidupkan

semula lampiran 24. Dalam satu permohonan untuk penghidupan semula dua persoalan, demi kepentingan pentadbiran keadilan, perlu dipertimbangkan, iaitu: (i) sama ada ketidakhadiran di perbicaraan perkara tersebut adalah salah; dan (ii) sama ada pemohon telah mengemukakan bahan yang mencukupi dalam permohonan beliau, untuk menunjukkan bahawa beliau mempunyai satu pembelaan/ tuntutan yang munasabah. A B

Diputuskan, menolak permohonan dengan kos:

(1) Penegasan Mr Hiew, bahawa Bar Council Box No 502 sememangnya nombor kotak firma beliau untuk mahkamah-mahkamah rendah, adalah nyata sebagai satu kecuaian di pihak firma beliau. Walau apa sekalipun, memandangkan beliau telah mengetahui bahawa satu lampiran 23 (iaitu notis rayuan terhadap penolong kanan pendaftar yang tidak membenarkan penggunaan afidavit) telah diterima dengan sempurna oleh firma beliau walaupun ia mempunyai nombor kotak yang sama iaitu 'Box No 502', mahkamah tidak percaya langsung tentang pendapat bahawa lampiran 24 tidak sampai ke firma beliau (lihat ms 250B–C). C D

(2) Berhubung dengan persoalan kedua, perenggan 7(b) kepada afidavit yang menyokong permohonan untuk penghidupan semula ('lampiran 29') hanya mengandungi satu pernyataan yang umum dan asas bahawa terdapat merit dalam rayuan tersebut, tanpa melebihi apa-apa butiran berkaitan persoalan tentang merit atau sekurang-kurangnya menyatakan, sebagai contoh, bahawa merit tersebut telah dinyatakan dalam pembelaan atau afidavit terdahulu (jika notis tentang niat untuk menggunakan yang sama telah diberikan). Memandangkan lampiran 29 langsung tidak mempunyai butiran-butiran sedemikian, mahkamah telah memutuskan bahawa tiada bahan telah dikemukakan kepada Mahkamah Tinggi yang membolehkan mahkamah menggunakan budi bicaranya (lihat ms 250D–E).] E F

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Notes

For cases on reinstatement, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1169–1171.

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Legislation referred to

Rules of the High Court 1980 O 14

CP Lee (*Azman, Davidson & Co*) for plaintiff/respondent.
YL Hiew (*G Gunaseelan & Assoc*) for the third defendant/applicant.

I

Vincent Ng J: As the third defendant's ('D3') appeal against my decision concerns a very short point pertaining the exercise of the court's

A discretionary powers, I shall make an earnest endeavour to write a truly brief judgment coupled with an equally serious effort to avoid discussing trite and well settled law.

Normally, an application to reinstate a matter which has been struck out is uneventful. If there is no objection from the other side, it is often B reinstated as a matter of course subject to costs to the adverse side.

Yet nevertheless, quite occasionally a court is confronted with a vigorous objection from the opposing side. This happened in the instant case when I heard encl 30, in which D3 had sought reinstatement of the appeal ('encl 24') which was struck out by me on 2 April 2002 due to non-attendance of D3 and his counsel at the hearing of the same. Enclosure 24 C was D3's appeal against the decision of the senior assistant registrar allowing the plaintiff to enter summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') against D3 (the first defendant did not contest and the second defendant had earlier admitted liability on the plaintiff's claim) in the sum of RM1,244,222 (a joint liability figure) being D the aggregate sum due to the plaintiff on rental of various equipment.

The objection to a reinstatement of encl 24 ('the appeal') by the plaintiff was through its counsel, Mr CP Lee, expressed in the following terms:

> We object to the reinstatement because the supporting affidavit Lampiran 29 E did not disclose any in the appeal. It only states that 'rayuan D3 memang bermerit'. The first defendant (the borrower) did not contest and the second defendant (the other guarantor) admitted liability — only D3 now wishes to contest. Summary judgment was granted. No defence was filed and there was no notice of intention to use affidavits in respect of other applications as required under the RHC. Even assuming that they were in fact unaware of the F 2 April 2002 hearing of encl 24, yet they now have the opportunity to show that they have an arguable appeal. In this case, I now observe that they themselves rubber stamped 'Box No 502' (Bar Council Box) and the court would have deposited encl 24 in that box.

Mr YL Hiew for D3, who chose not to file any defence, could only attempt the following reply: G

> Box number chopped by us at the back of Lampiran 24 is our lower court BC Box number. I acknowledge that Lampiran 23 (notice of appeal against the SAR's decision disallowing use of an affidavit) was received by us though the same chop 'Box No 502' was stamped on the back of Lampiran 23. Both counsel attended the 3 April 2002 hearing stated in Lampiran 23 and appeal H was withdrawn. I would also ask this court to exercise its discretion under O 92 r 4 of the RHC. I concede that the affidavit supporting the application for reinstatement only stated that 'rayuan D3 memang bermerit dan bukannya remeh temeh' but does not refer to paragraphs in other affidavits which deals with the question of .

Hence, I am seized with the duty to carefully examine the material in the I application before me to determine whether to reinstate encl 24. In an application for reinstatement two questions, in the interests of the due administration of justice, fall to be considered, namely:

(i) whether the non-attendance at the hearing of the matter was culpable; and

(ii) whether the applicant tendered or presented sufficient material in his application, to show that he has a plausible or arguable defence/claim.

On the first question, I find the assertion of Mr Hiew, that the Bar Council Box No 502 was in fact his firm's box number for the lower courts, smacks of negligence on the part of his firm's employees. At any rate, as he had acknowledged that an earlier encl 23 (being the notice of appeal against the SAR's decision disallowing the use of an affidavit) was duly received by his firm though it bore the same box number stamped as 'Box No 502', I am not at all persuaded to the view that encl 24 did not reach his firm.

On the second question, three pre-eminently trite principles have to be borne in mind in an application for reinstatement. Firstly, an applicant could not require a court to reinstate a struck out matter as of right — it is not merely a matter of partaking in an automatic formal exercise before the judge, with the opponent as spectator. Secondly, reinstatement involves an exercise of the court's discretion. Thirdly, there must be sufficient material before the court to enable it to found the exercise of its discretion. Counsel for D3 appears to be unaware of the first two principles and has clearly breached the third. I find a serious infirmity in the affidavit supporting the application for reinstatement ('encl 29') affirmed on 12 June 2002. On the question of , para 7(b) of encl 29 only contains a general and bare statement that there were in the appeal, without condescending to any particulars pertaining to the question of or to at least state, for example, that the merits are as set out in the defence or an earlier affidavit (if notice of intention to use same has been given). As encl 29 was totally devoid of such particulars, I am driven to hold that there is no material presented to this court to found any exercise of the court's discretion. In any event, I would agree with counsel for the plaintiff's submission that: 'even assuming that the firm of solicitors for D3 had not received encl 24, yet D3 now have the opportunity to show that he has an arguable appeal'. This, in my judgment upon settled principles, is clearly fatal to the application and I dismissed encl 30 with costs to the plaintiff.

Application dismissed with costs.

Reported by Ezatul Zuria Azhari